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INTERNATIONAL JOINT COMMISSION

" (U.S. and Canada) 1909—

IN THE MATTER OF

THE APPLICATIONS OF THE
ST. CROIX WATER POWER COMPANY

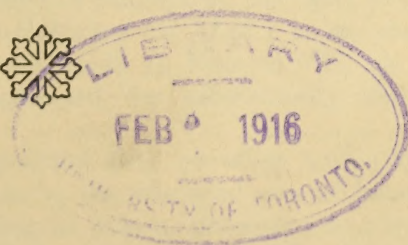
AND THE

SPRAGUE'S FALLS MANUFACTURING
COMPANY, LIMITED

FOR APPROVAL OF A DAM AND POWER CANAL
AND THE OBSTRUCTION, DIVERSION, AND USE
OF THE WATERS OF THE ST. CROIX RIVER AT
GRAND FALLS IN THE STATE OF MAINE AND
THE PROVINCE OF NEW BRUNSWICK

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ORDER AND OPINION
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INTERNATIONAL JOINT COMMISSION.

CANADA.

CHARLES A. MAGRATH, *Chairman.*
HENRY A. POWELL, K. C.
P. B. MIGNAULT, K. C.
LAWRENCE J. BURPEE, *Secretary.*

UNITED STATES.

OBADIAH GARDNER, *Chairman.*
JAMES A. TAWNEY.
R. B. GLENN.
WHITEHEAD KLUTTZ, *Secretary.*

INTERNATIONAL JOINT COMMISSION.

IN RE THE APPLICATIONS OF THE ST. CROIX WATER POWER CO. AND THE SPRAGUES FALLS MANUFACTURING CO. (LTD.), FOR APPROVAL OF A DAM AND POWER CANAL AND THE OBSTRUCTION, DIVERSION, AND USE OF THE WATERS OF THE ST. CROIX RIVER AT GRAND FALLS IN THE STATE OF MAINE AND THE PROVINCE OF NEW BRUNSWICK.

ORDER OF APPROVAL.

The above applications having come on for hearing at the city of Calais, in the State of Maine, on the 15th day of June, 1915, and having been continued to the 5th, 6th, and 7th days of October, 1915, at the city of Ottawa, Canada, on which last day the hearing was concluded, the said applications relating to the same subject matter being consolidated and heard as one application, and due notice of the filing of said applications and of the time and place of the said hearings having been given to all parties interested in both countries, the commission having heard the evidence adduced by all parties interested, including the statements of the engineer representatives of the United States and the Dominion of Canada in respect thereto, and also having heard counsel on behalf of all parties interested, finds as follows:

(a) The St. Croix Water Power Co. is incorporated by special act of the legislature of the State of Maine (ch. 203, Acts of 1899), and the Spragues Falls Manufacturing Co. (Ltd.) is incorporated by statute of the Dominion of Canada (2 Edward VII, ch. 103), both companies being incorporated for substantially the same purpose.

(b) Acting upon the supposition that no other authority was necessary than that given them by the aforesaid acts of incorporation, the said companies, acting in unison, proceeded to construct, and did construct, at Grand Falls a dam across the St. Croix River and a power canal on the United States side of the St. Croix River to convey the waters of the river to a power house situate a short dis-

tance below the dam, which dam is for the purpose and has the effect of obstructing and holding back the waters of the said river.

(c) The dam is of the Ambursen type. It is 820 feet long between the present Canadian shore line and the international boundary and 280 feet long between the present United States shore line and the international boundary, with an abutment on the Canadian shore 40 feet long and an abutment on the United States shore 100 feet long.

(d) The crest of the dam for a length of 80 feet on the United States side of the international boundary and for a length of 218 feet on the Canadian side is at an elevation of 193.70 above mean sea level; for a length of 540 feet on the Canadian side it is at an elevation of 198.10 feet above mean sea level; and for a further length of 22 feet on the United States side and 54 feet on the Canadian side it is at an elevation of 205.10 above mean sea level. Flashboards at an elevation of 201.20 above mean sea level cap the whole of the two lower sections of the crest. In the dam on the Canadian side are two submerged sluices 6 feet by 8 feet, with sills at an elevation of 167.60. These are controlled by gates operated by electric power. On the United States side are nine Tainter regulating sluice gates 14 feet wide, with sills at an elevation of 196.10 and a log sluice at the shore end. The dam as now constructed contains no fishway.

(e) The power canal leaves the west branch of the St. Croix River a short distance above the dam and near the junction of the east and the west branches of the river. It is 2,700 feet long, 50 feet wide on the bottom at elevation 185.10, and 115 feet wide at elevation 202.10. This canal joins the St. Croix River a short distance below the dam, and at the junction is a power house having therein at present two (with space for a third) 54-inch Holyoke wheels with capacity of 4,000 horsepower each, under a 49-foot head.

(f) Provision for a fishway has been made in the dam at the lower end of the power canal. This fishway has been designed to permit the passage of fish up and down stream through the power canal, but the fishway is not yet completed.

The log sluiceway above referred to in the dam across the river is ample for the purpose of driving logs or lumber downstream.

(g) The two companies have constructed and are now using the said dam and power canal at Grand Falls for the purpose of generating power supplied to the pulp and paper mill now owned by the St. Croix Paper Co. at Woodland, in the State of Maine, a few miles farther down said stream.

(h) The St. Croix River is a boundary water within the meaning of the treaty of January 11, 1909, between Great Britain and the United States of America. The effect of the said dam and power canal as constructed and maintained is to divert the waters of the

said St. Croix River on the Canadian side and cause them to flow through the State of Maine, thereby altering the levels on the United States side of the international boundary; also to divert the waters of the said river on the United States side of the said boundary, thereby altering the levels of the waters of the said river on the Canadian side of the said boundary.

(i) The applicants are owners of the riparian lands on both sides of the said river which are affected by the change of the levels of the said river.

The companies having applied to the commission for its approval of the said dam and its maintenance and operation and of the obstruction, diversion, and use of said waters, and it appearing to the commission that such approval should be granted;

Therefore, it is hereby ordered that the maintenance and operation of the dam aforesaid and the diversion and use of the waters of said river for the purpose in paragraph (g) hereinbefore contained, be, and the same are hereby, approved upon and subject to the following conditions:

1. That the applicants have obtained, or shall hereafter obtain, from the United States and the Dominion of Canada within their respective jurisdictions authority for the maintenance of the said dam as constructed and the obstruction, diversion, and use of the waters of the St. Croix River at Grand Falls, in the State of Maine and the Province of New Brunswick, for the said purpose.

2. In case the waters so diverted cease to be used for the purpose mentioned in paragraph (g), this order of approval shall thereupon cease to be operative unless the commission, upon the application of the United States or the Dominion of Canada, continue it on such terms and conditions as the commission may prescribe.

3. All the sluices, log sluices, flashboards, bypasses, power plant, and storage reservoirs shall be so operated as to prevent the level of the water at the dam rising above 202 (mean sea-level datum). For this purpose the operation of all the said works, canals, head-gates, sluices, and log sluices of all kinds, dams, and bypasses shall be under the direct control of the board hereinafter designated.

4. All the sluices, log sluices, power plants, and storage dams shall be so operated as to pass continuously the minimum discharge of the river plus such other quantity as the board of control shall determine is available.

5. To enable the board to determine the quantity of water that should be passed downstream, two gauges for registering the precipitation shall be established by the two Governments at suitable stations in the valley of the said river.

6. An officer to be appointed by the Governor General in council of Canada and one to be appointed by the Secretary of War of the United States shall form a board whose duty it shall be to formulate rules under which the sluice gates, log sluices, power works, and storage dams are to be operated to prevent as nearly as possible a higher level than 202 (mean sea-level datum) and to secure to the users of water below Grand Falls the flow of water to which they are entitled. It shall be the further duty of this board to see that any rules or regulations now or hereafter made by proper authority are duly obeyed.

7. The power company at Grand Falls shall keep continuous records, satisfactory to the board, which will show the quantity of water used by it, and shall furnish to the board, when required, full information from such records.

8. The board will determine at all times the amount of water to be passed to the users of water below, and the owners of the said dam and power canal for the time being shall supply the necessary labor for the operation of the various gates.

9. The cost of maintaining all parts of the dam and all sluices and log sluices shall be borne by the owners thereof, and this work of maintenance shall be done in a manner satisfactory to both Governments.

10. In the event of a disagreement between the members of said board, in respect to anything required of said board herein, or in respect to the duties or powers of said board, or as to the exercise of such duties or powers, the question at issue shall, upon the application of either Government, be referred to this commission for its decision.

Dated at New York, N. Y., November 9, 1915.

O. GARDNER.

C. A. MAGRATH.

JAMES A. TAWNEY.

H. A. POWELL.

R. B. GLENN.

P. B. MIGNAULT.

INTERNATIONAL JOINT COMMISSION.

IN THE MATTER OF THE APPLICATIONS OF THE ST. CROIX WATER POWER CO. AND THE SPRAGUE'S FALLS MANUFACTURING CO. (LTD.), FOR APPROVAL OF A DAM AND POWER CANAL AND THE OBSTRUCTION, DIVERSION, AND USE OF THE WATERS OF THE ST. CROIX RIVER AT GRAND FALLS IN THE STATE OF MAINE AND THE PROVINCE OF NEW BRUNSWICK.

OPINION.

These applications are for the approval of a dam already built across the St. Croix River, and the diversion of the waters of the said river through a canal already constructed, beginning at a point on the west bank above Grand Falls, and thence running through a part of the State of Maine to a point on the same side of the river a short distance below Grand Falls. The St. Croix River separates the State of Maine from the Province of New Brunswick and is a boundary water within the meaning of the treaty of January 11, 1909, between Great Britain and the United States of America.

The St. Croix Water Power Co. was incorporated by special act of the Legislature of the State of Maine (ch. 203, Acts of 1899), and the Sprague's Falls Manufacturing Co. (Ltd.) was incorporated by statute of the Dominion of Canada (2 Edward VII, ch. 103). Both companies were authorized by their respective acts of incorporation to dam the waters of the St. Croix, but neither has ever been authorized by either legislature to divert the waters of the river into other channels. The dam has not yet been authorized by the Congress of the United States, which is necessary to legalize it within the United States territory. The companies were advised that if they became riparian owners of the land on both sides of the stream throughout the whole course of the diversion, they would be justified in taking the waters from the bed of the river and using them, provided the waters were returned to the natural bed of the stream before reaching the lands of the lower riparian proprietors.

Acting on this advice and assuming that no other authority was necessary than that given by the acts of incorporation, the companies, working in unison, constructed this dam and power canal in order to utilize a valuable water power at Grand Falls, which they proposed doing by conveying the waters of the river to a power house situate a short distance below the dam at the lower junction of the canal with the river, and they purchased all the riparian lands along the course of the diversion, as well as the lands which would be overflowed through the operation of the dam. The effect of the works is and will be to cause one-half or upward, in fact at times the whole of the waters of the river, to be diverted from the natural bed of the stream and to flow through United States territory, where the power development takes place. The waters, after passing through the power wheels of the power house, return to the channel of the river.

About \$1,000,000 was expended by the companies in their undertakings. When the works were almost completed the companies became aware for the first time of the fact that the approval by this commission of the dam and of the diversion of the waters, and their authorization by the Congress of the United States, were necessary. Immediately on being apprised of this necessity the companies set about obtaining the approval of the commission. Separate applications were filed on behalf of the companies, but the applications at the hearings were treated as one.

The power of the commission to deal with these applications is conferred by the third and eighth articles of the treaty. These articles so far as they are pertinent to the present case are as follows:

Article III.—It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

Article VIII.—This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which, under Articles III and IV of this treaty, the approval of this commission is required, and in passing upon such cases the commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters * * *.

The requirements for an equal division may, in the discretion of the commission, be suspended in cases of temporary diversions along boundary waters at

points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side * * *.

The facts that the St. Croix River is a boundary water within the meaning of the treaty, that the erection of the portion of the dam on each side of the boundary line has the effect of altering the level upon the other side, and that the diversion at times will rob the river for some distance below the dam of all its waters, bring the case within Article III and, subject to Article VIII, give the commission jurisdiction. While these facts were admitted at the hearings by all interested parties present, it was suggested by some that, as the undertaking had not been authorized by the United States or the Dominion of Canada, the commission could not make an order of approval. It was further contended that by Article III (especially in view of the interpretation of that article by the rules of the commission) the approval of the commission should have been obtained before the works were undertaken, and that inasmuch as this had not been done, the works were illegal and could not be approved of on these applications.

In support of this point it was urged that no statute had been passed by Congress, which was necessary, as the river is a navigable river within the law of the United States.

Another contention put forward by the Attorney General for New Brunswick was that the bed of the St. Croix River on the Canadian side of the boundary line, belonged to the Province of New Brunswick and that the consent of the Province to the works had not been obtained. In the opinion of the commission, it is not necessary to pass judgment on these contentions.

Under Article III two things are necessary to legalize an obstruction or a diversion of boundary waters. In the first place, the act must be authorized "by the United States or the Dominion of Canada within their respective jurisdictions"; and in the second place, it must have the approval of the commission. Neither of these requirements is by the treaty required to be satisfied previously to the other, and however desirable under ordinary circumstances it might be that full authority should first be obtained from the United States or Canada, this order of sequence can never be more than a matter of desirable policy. The language of the article—"No further or other uses or obstructions or diversions * * * shall be made except by authority of the United States or the Dominion of Canada," etc.—is difficult to construe. Future cases may require the commission to undertake its construction, but the necessity for so doing has not arisen in the present case. Under the circumstances of the applications the commission is of opinion that inasmuch as hardship would be done to the applicants if its approval were postponed, it should

grant approval now, and throw upon the applicants the responsibility of satisfying themselves that all necessary authority from the United States or the Dominion of Canada has or shall be obtained.

More difficult questions arise under Article VIII. This article expressly declares that each country on its own side of the boundary shall have equal and similar rights in the use of the boundary waters, and it refers to this declaration as "the requirement for an equal division."

The applications are not limited to a diversion of a moiety of the waters. They practically ask for approval of the diversion at Grand Falls of the whole or such portion of the waters of St. Croix River as the applicants may require. Has the commission power to approve of this diversion in the face of the clearly expressed principle of equal and similar rights and division? The treaty says that the requirements for an equal division may, in the discretion of the commission, be suspended in certain cases. The question, therefore, before the commission is whether or not the rule can in the case of these applications be suspended, and if it can be suspended, are the circumstances of the case such that the commission should do so?

The cases in which the commission can suspend the rule are cases of "temporary" diversion at points where an equal division can not be made advantageously on account of local conditions, and where such diversions do not diminish elsewhere the amount available for use on the other side.

The word "temporary" is somewhat vague and is not a term of exact science. During the argument it was contended on the one hand that the word applies to the period the diversion through the canal is to be enjoyed and that the commission has power to approve only of a diversion for a limited time. It was contended on the other hand that the word is used in somewhat of a secondary sense and expresses rather the character of the diversion than the period of time the diversion is to exist, and that inasmuch as in the case before the commission the waters are returned almost immediately to the channel of the stream the diversion is temporary; and as there is no limitation of the time the diversion is to be enjoyed, the commission has power to approve thereof for an unlimited period. A view similar in result to the last, but differently expressed, was also advanced, that the word "temporary" is used in its primary sense (that of time), and refers to the period that any particular portion of the waters of the stream has been diverted before its return to the channel.

In the view the commission takes of what is appropriate action on its part, it is unnecessary to express an opinion as to which, if any, of these contentions is correct. As the pulp and paper mill farther downstream at Sprague's Falls or Woodland is the industry in con-

nection with which the power developed at Grand Falls is to be used, and as the company owning this mill and the applicants are virtually the same, the commission is of the opinion that it should, provided it has the power, grant its approval of the diversion of the waters for use by the St. Croix pulp and paper mill so long as the mill shall have occasion bona fide to use the same, and when such use ceases the question of diversion should again be considered by the commission, in view of the local conditions then existing.

The next question that arises is, Can Canada advantageously use its moiety of the waters at this particular point—Grand Falls? The word “advantageously” is also an inexact term. Both companies had engineers as witnesses at the hearing, and they were all of the opinion that the Dominion could not, in view of the local conditions at this point, both physical and economical, advantageously use its moiety of the waters. Possibly the majority of people would be of a different opinion. The evidence of the engineers, however, was neither challenged nor contradicted. Taking it to be correct, the commission has jurisdiction, unless the diversion diminishes elsewhere, the amount of water available for use on the Canadian side. The diversion does not diminish the amount of water available for use on the Canadian side below Grand Falls. The question is with regard to Spednic Falls, situated a short distance above Grand Falls. At this point the water penned back by the dam drowns out a rapid which in the natural condition of affairs would be available for power purposes. The dam serves two purposes: First, the storage of water which would be a great benefit to all the water powers on the river below, both in the utilization of freshet water and the equalization of the flow of the stream; second, it assists to a certain degree in the diversion of the water through the canal. Standing by itself as an obstruction of the river backing up its water, the dam falls within the jurisdiction of the commission, by virtue of Article III of the treaty. Does the fact that the dam does more than this, and incidentally assists in the diversion of the water as asked for, place the diversion beyond the jurisdiction of the commission when the necessary effect of the dam is to deprive Canada of the use of the water available at Spednic Falls? At the hearing no objection was taken to the jurisdiction of the commission on account of the effect upon Spednic Falls, either of the diversion of water through the canal or of its being penned back by the dam. In view of all the circumstances of the case, and of the course pursued by the parties interested, the commission feels that it should act in accordance with the maxim, “*Boni judicis est ampliare jurisdictionem.*”

The facts of this case call strongly for the exercise of a discretion favorable to the applicants. The Parliament of Canada did not, it

is true, by its act of incorporation of the Sprague's Falls Manufacturing Co. (Ltd.), authorize the diversion of these waters through the territory of the United States, but it did that which might work out the same result. It authorized the construction of a dam in terms sufficiently wide to cover the site without any expressed restrictions as to the place or country in which the power developed was to take place.

The companies interested through a mistake, but in good faith, believing they had a right to act as they did, expended the large amount of money referred to in the construction of the dam across the river and of the canal and power house in United States territory. They expended this money with the knowledge of Canada, or at least with the knowledge of the citizens of Canada resident in the locality of the undertaking, that the expenditures were being made. Under all the circumstances of the case the commission feels the diversion should be approved.

There are other developments of water power farther downstream, and there are possibilities of still further development both above and below the dam. The lower proprietors of water power should not be at the mercy of the upper proprietors, and should not be subjected to losses consequent upon arbitrary interruptions of the flow of the water. To guard against this condition of affairs the operation of the sluices, gates, dam, power canal, and power house should be under the control of a board composed of a qualified representative from each country. The order of approval will therefore be subject to this condition. There are other conditions which the commission has seen fit to prescribe, and which are embodied in the order of approval.

One point was raised at the hearings to which reference may be made. The applicant companies, being owners in law or equity of the riparian lands throughout the whole course of the diversion, could do as they liked with the water of the stream so long as they returned it undiminished in quantity and uninjured in quality to the riparian owners lower down the river, and did not interfere with what might be called the right of highway. This contention would be unquestionably correct if applied to the rights of either the United States or Canadian proprietors *inter se*, but this principle of law can not be applied to the citizens of one country who seek to exploit the water rights of another country. The possibility of developing power and of thus creating and expanding industrial growth by the utilization of a country's natural features, in addition to being a private right, is a valuable national asset. No State should be called upon to part with such an asset without recompense. This phase of the case was not taken up or if taken was not emphasized before the commission, and

little evidence, if any, in relation to it was submitted. The commission, therefore, feels itself relieved of the difficult task of determining the principle on which such recompense should be awarded as a condition of approval.

It should finally be observed that this is an entirely exceptional case, and the approval which is granted by the commission should not be taken as a precedent or as an indication that in another case the commission will sanction a work which has been built without its approval having been first obtained.

Opinion by Mr. Powell.

In concurring in the foregoing opinion Mr. Magrath wishes to point out that, while not strictly pertinent to the matter before the commission, the practice by Governments of making grants of land carrying riparian rights in streams was initiated when these rights were not looked upon as being of much value, and unfortunately the practice has outlived the old condition of things. In recent years, however, owing largely to electrical transmission, power rights have acquired great importance and may properly be regarded as public utilities. It would be well for all Legislatures of both the United States and Canada to consider the desirability of retaining or acquiring these valuable assets for the benefit of the public.

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